IN THE HIGH COURT OF BOMBAY AT PANAJI

CRIMINAL REVISION APPLICATION NO. 14 OF 2007

Shri Namdev Toraskar,
s/o. Late Dharma Toraskar,
r/o. H. No. 387,
Dando, Siolim,
Bardez, Goa. ..... Petitioner/Accused

Versus

S T A T E
(Through the Public Prosecutor)
Panaji, Goa. ..... Respondent

CRIMINAL REVISION APPLICATION NO. 15 OF 2007

Shri Jaganath Shirodkar,
s/o. Jaidev Shirodkar,
r/o. H. No. 407,
Dando, Siolim,
Bardez, Goa. ..... Petitioner/Accused

Versus

S T A T E
(Through the Public Prosecutor)
Panaji, Goa. ..... Respondent

Mr. Nitin Sardessai, Advocate for the Petitioners/Accused.

Mr. C. A. Ferreira, Public Prosecutor for the State/Respondent.

CORAM: N. A. BRITTO, J.

DATE: 3rd May, 2007.

ORAL JUDGMENT

Heard Shri Sardessai, the learned Counsel on behalf of the petitioners-accused and Shri C. A. Ferreira, the learned Public Prosecutor, on behalf of the respondent-Complainant.

2. These revision petitions are filed by accused no.1/Namdev and accused no.2/Jaganath, against the Order dated 05.02.2007 of the learned Asst. Sessions Judge, Mapusa, by which, their conviction under Section 452 and 323 I.P.C. has been upheld and they have been sentenced, namely A1/Namdev, to undergo four months R.I. and A2/Jaganath to undergo three months R.I. both, under Section 452 I.P.C. Under Section 323 I.P.C., the sentence of fine of Rs.1,000/- , in default three months simple imprisonment, has been upheld. Rs.1,000/- has been ordered to be paid to Pw2/Karishma, by way of compensation.

3. The case of the prosecution, in brief, was that on 22.09.2003 at 22.00 hours, the accused in furtherance of their common intention, committed criminal trespass into the house of the Complainant/Pw1 Kashinath's father in law by forcibly opening the closed front door and assaulted the wife of the

Complainant i.e. Pw2/Karishma and caused her simple injuries and abused her as well as the Complainant and his family members. The chargesheet was filed against three accused under Section 452, 326, 323, 504 read with Section 34 I.P.C.

4. However, the learned Magistrate by Order dated 14.11.2006, acquitted accused no.3, Chandrashekar, of all the offences and A1/Namdev and A2/Jaganath under Section 326 I.P.C., but convicted them under Section 452, 323, 504 read with Section 34 I.P.C.

5. Both the petitioners/accused filed an appeal against the said conviction and the learned Asst. Sessions Judge, by his Order dated 05.02.2007, was pleased to acquit both the petitioners under Section 504 read with Section 34 I.P.C., but was pleased to maintain the conviction under Section 452, 323 read with Section 34 I.P.C. As far as Section 452 I.P.C. is concerned, the learned Assistant Sessions Judge, observed that A1/Namdev deserved three months R.I. to be imposed but imposed four months R.I. Likewise, the learned Assistant Sessions Judge imposed three months R.I. under Section 452 against A2/Jaganath, after observing that it had to be reduced to four months R.I.

6. There is no dispute that after the accused were arrested, each of

the accused, A1/Namdev and A2/Jaganath, have undergone detention for a period of five days, in connection with the investigations. There is also no dispute that although Section 452 I.P.C. provides imprisonment and also fine, no fine has been imposed against the accused under Section 452 I.P.C.

7. Shri Sardessai, learned Counsel on behalf of the petitioners, submits that both the Courts below could not have convicted both the accused under Section 323 I.P.C., as there was nothing in the evidence of Pw2/Karishma that she had suffered any pain on account of the kick having been given by A2/Jaganath on her stomach. As per learned Counsel, that was the minimum requirement to be proved to attract Section 323 I.P.C. Learned Counsel further points out that at the relevant time, Pw2/Karishma was pregnant and the Medical Officer, namely Pw6/Dr. Velip, who examined her subsequently, had opined that the abdominal pain which Pw2/Karishma complained, could be due to her pregnancy. Learned Counsel on behalf of the petitioners therefore contends that in the absence of any positive statement having been made by Pw2/Karishma that she suffered any pain on account of the kick given by A2/Jaganath, the accused could not have been convicted under Section 323 I.P.C.

8. On the other hand, the learned Public Prosecutor, on behalf of the respondent, points out that Pw6/Dr. Velip had clearly opined that upon

examination of Pw2/Karishma, he had found mild tenderness, which he described as a simple injury and, therefore, it is obvious that the pain which she suffered was due to mild tenderness suffered by her due to the kick given and not on account of her pregnancy.

9. I am unimpressed with the submissions made on behalf of the petitioners. The incident took place on 22.09.2003, at about 22.00 hours. As per the version given by Pw2/Karishma, when she shouted for help, A2/Jaganath kicked her on the stomach and after the incident they went to the Police Station and they were referred for medical examination at the Siolim Hospital. The evidence of Pw6/Dr. Velip shows that on the next day at about 12.50 a.m., he had examined Pw2/Karishma, who was pregnant of about nine months with history of mild abdominal pain and also with history of good foetal movement and that he had found mild tenderness present and so also little foetal heart sounds were present. Pw6/Dr. Velip, also opined that the said injury namely mild tenderness could be caused by hard and blunt object and that the same could also be caused by a kick on the abdomen. It is true that Pw2/Karishma did not specifically state that on account of the kick given by A2/Jaganath, she had suffered mild tenderness and, consequently, pain. No doubt, Pw6/Dr. Velip, in cross examination, admitted the possibility that mild abdominal pain could occur due to the pregnancy but once the facts stated by Pw2/Karishma and Pw6/Dr. Velip are co-related, the only inference which is

probable is that the said mild tenderness which was found by Pw6/Dr. Velip on the person of Pw2/Karishma, was as a result of a kick given by A2/Jaganath and on account of which she had complained of pain to Pw6/Dr. Velip, when she was sent for medical examination and therefore she had suffered the pain. The evidence of the aforesaid two witnesses was more than sufficient to come to the conclusion that as a result of the kick given by A2/Jaganath, Pw2/Karishma had suffered from mild tenderness and consequently pain and therefore, in my view, the conviction of the accused under Section 323, could not be faulted.

10. Admittedly, the incident had taken place on the spur of the moment when the accused had gone to the house of the father in law of the Complainant Pw1/Kashinath, in search of the said father in law by name Bhanudas. Although it was alleged that A1-Namdev had removed a knife from his pocket, that part of the story of the prosecution has been disbelieved by both the Courts below and the subsequent assault itself appears to have taken place by fist blows and kicks.

11. Punishment to be inflicted, must always be proportionate to the crime committed, though in law, there are no golden scales to measure the same. Considering the facts of the case, in my view, there is scope for further modifying the sentence imposed under Section 452 I.P.C. Considering that

the incident had taken place on the spur of the moment when the accused are stated to have gone in search of the father in law of the said Complainant and considering the injuries inflicted were simple in nature and without any weapons, the sentence imposed upon the accused under Section 323 I.P.C., shall remain unaltered but with a rider that the said fine to be of Rs.1,000/- each to be paid by the accused, shall be paid to Pw2/Karishma by way of compensation. As far as the sentence under Section 452 I.P.C. is concerned, the period of five days of detention already undergone by each of the accused, shall be considered as substantive sentence imposed upon them. In other words, the accused do not deserve any further substantive sentence to be imposed on them. Section 452 I.P.C., also provides for imposition of fine. Therefore, each of the accused shall pay Rs.5,000/- under Section 452 I.P.C. by way of fine and in case the same is realised, a sum of Rs.5,000/- shall be paid to Pw2/Karishma, by way of compensation. In default of payment of fine herein ordered, the accused shall undergo S.I. of three months each.

12. The fine imposed to be deposited before the trial Court within a period of four weeks and the compensation ordered to be paid shall also be disbursed by the trial Court.

13. In view of the above, the revision petitions partly succeeds. The Order of the learned Assistant Sessions Judge, shall stand accordingly

modified.

Expedite authenticated copy.

N. A. BRITTO, J.

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